No. 91-2019

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF MINNESOTA,

Petitioner,

—v.—

TIMOTHY DICKERSON,

Respondent.

ON WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE MINNESOTA CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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CONSENT OF PARTIES

Petitioner and respondent have consented to the filing of this brief, and their letters of consent are being filed separately herewith pursuant to Rule 37.3.

INTEREST OF *AMICI*

The American Civil Liberties Union is a national, nonprofit, nonpartisan organization with a membership of nearly 300,000. The Minnesota Civil Liberties Union is one of its state affiliates. The ACLU and its affiliates are dedicated to the preservation and protection of the rights and liberties guaranteed by the Constitution.

The ACLU and its affiliates have a long history of devoting particular attention to preserving the vital rights secured by the Fourth Amendment's proscription against unreasonable search and seizure. This Court's decision will have a significant impact on the search and seizure practices adopted during investigative detentions. *Amici* submits that its experience in Fourth Amendment cases enables it to present a perspective different from the parties and other *amici* on the issues before this Court.

STATEMENT OF THE CASE

On November 9, 1989, Minneapolis police officer Vernon Rose and his partner were on patrol in North Minneapolis. Pet. App. A3; 2/20/90 Tr. 3, 6-7. At 8:15 p.m., the officers observed respondent exit from an apartment building on Morgan Avenue North. Pet. App. A3. After respondent abruptly changed direction, the police decided to stop Mr. Dickerson and "'check [him] . . . for weapons and contraband.'" *Id*. Once the respondent was detained, Officer Rose conducted a pat search, during which he felt a small lump in the pocket of Mr. Dickerson's nylon jacket. Pet. App. A3-A4. Although the lump was certainly *not* a weapon, *see id*. at A10, Officer Rose testified that he nevertheless proceeded to "examine[] [the lump] with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." 2/20/90 Tr. 9. The officer then reached inside the pocket and removed "what proved to be .20 grams of crack cocaine in a

knotted sandwich-wrap bag. The confiscated material was described as the size of a pea or a marble." Pet. App. A4.

Respondent's motion to suppress this evidence was denied by the trial court, which found the stop valid, and which upheld the seizure of the cocaine under a "plain feel" exception. Pet. App. A2. Thereafter, respondent was convicted of fifth degree possession of a controlled substance. *Id*.

The Minnesota Court of Appeals, in a unanimous decision, upheld the stop, but found that the pat search exceeded the scope of *Terry* v. *Ohio*, 392 U.S. 1 (1968). *See* Pet. App. B6-B7. In so holding, the court declined to establish a "plain feel" exception to the warrant requirement. *Id*. at B10. The Minnesota Supreme Court affirmed, similarly finding a violation of *Terry*. Pet. App. A5. The court also agreed that a "plain feel" exception was unjustified, recognizing that "the sense of touch is far more intrusive [than the sense of sight] into the personal privacy that is at the core of the fourth amendment." *Id*. at A8.

SUMMARY OF ARGUMENT

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court established clear limitations governing warrantless searches of suspects conducted during investigative stops. The *Terry* Court held that a police officer, for his own protection and safety, may conduct a limited pat-down for weapons that he reasonably suspects may be in the possession of the person he has stopped. But "[n]othing in *Terry* can be understood to allow . . . any search whatever for anything but weapons." *Ybarra* v. *Illinois*, 444 U.S. 85, 93-94 (1979). By articulating this carefully tailored limitation, this Court delineated a bright-line rule that balanced the legitimate safety concerns of the police and the privacy interests of the citizenry protected by the Fourth Amendment.

In this case, however, Officer Rose exceeded the scope of *Terry* when he determined that the pea-sized lump in respondent's pocket was clearly *not* a weapon and yet began to squeeze, slide and manipulate the contents of respondent's pocket in an effort to figure out what the lump was. This painstaking search of respondent's pocket could not have been a "mere continuation" of the limited pat-down for weapons authorized by *Terry* for the simple reason that the officer "*never* thought the lump was a weapon," Pet. App. B4 (emphasis added), and only developed his view that the lump was cocaine *after* "manipulating" and "sliding" it. Pet. App. A6. By "taking action" in this way, "unrelated to the objectives of the authorized [*Terry* pat-down for weapons]," Officer Rose clearly "produce[d] a new invasion of respondent's privacy . . . ." *Arizona* v. *Hicks*, 480 U.S. 321, 325 (1987). Recognizing that Officer Rose's search of respondent's pocket violated the well-settled *Terry* standard, the Minnesota Supreme Court properly upheld the suppression of the contraband seized by the police following this illegal search. That judgment should be affirmed.

Petitioner and its supporting *amici* wrongly claim that one "holding" of the Minnesota Supreme Court was that the sense of touch can never provide probable cause to believe that an object felt during a pat-down is contraband. There is no such holding in the court's opinion; all that the Minnesota Supreme Court held was that Officer Rose exceeded *Terry*'s scope by searching respondent's pocket *after* he had assured himself that no weapon was present. Pet. App. A5-A7.

Affirmance of the Minnesota Supreme Court would involve simply a straightforward application of *Terry*, and would not require this Court to hold that the sense of touch can never form the basis for probable cause. Indeed, that "issue" is simply not presented here. The conduct identified as unconstitutional by the Minnesota Supreme Court was *not* Officer Rose's reliance upon his sense of touch but, rather, his expansion of a warrantless search beyond the "'narrow

scope'" authorized by *Terry*. *Ybarra* v. *Illinois*, 444 U.S. at 93 (citation omitted). As the Minnesota Supreme Court properly found, to the extent that Officer Rose eventually developed probable cause to believe that the lump in respondent's pocket was cocaine, he acquired that belief through a search violating *Terry*.

In other cases -- *unlike* this one -- where probable cause to arrest is developed in the course of an appropriately limited *Terry* pat-down for weapons (whether through the sense of touch or otherwise), the police would be entitled to conduct a full-scale search incident to arrest. *See Rawlings* v. *Kentucky*, 448 U.S. 98 (1980). Affirmance of the Minnesota Supreme Court, therefore, would not impose artificial constraints upon legitimate police action. It would, however, ensure that important privacy interests of those who are stopped solely on the basis of reasonable suspicion are protected against unjustified intrusion.

ARGUMENT

I. THE WARRANTLESS SEARCH OF RESPONDENT'S POCKET CONTRAVENED THE FOURTH AMENDMENT BY EXCEEDING THE SCOPE OF *TERRY*

A. A *Terry* frisk is limited solely to a narrowly-tailored search for weapons.

In *Terry* v. *Ohio*, this Court set forth the standard governing pat-downs of temporarily detained suspects: an officer can only conduct a *limited protective* search for weapons (a "frisk") when there is "reason to believe that he is dealing with an armed and dangerous individual . . . ." 392 U.S. at 27. Although subsequent cases have extended

Terry's reach to other contexts,[1] this Court has never deviated from the fundamental rule that a frisk is singularly limited to weapon searches, and thus, *cannot* be conducted simply to locate contraband or evidence of crime.

These principles were reaffirmed in *Ybarra* v. *Illinois*:

> The *Terry* case created an exception to the requirement of probable cause, an exception whose "*narrow scope*" this Court "has been careful to maintain." Under that doctrine a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted. . . . Nothing in *Terry* can be understood to allow a generalized "cursory search for weapons" or, indeed, *any search whatever for anything but weapons.*

444 U.S. at 93-94 (emphasis added) (footnotes and citation omitted); *see also Adams* v. *Williams*, 407 U.S. 143, 146 (1972).

This Court's longstanding adherence to the limitations embodied in the *Terry* standard is rooted in the rule's practicality and common sense. *First*, the *Terry* standard offers a clear and straightforward rule that can be readily followed by the law-enforcement community. The line between a limited pat-down for weapons and a full-blown search for any type of contraband or evidence is relatively simple for the police to maintain and for the courts to monitor. In *Arizona*

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[1] *See, e.g., Michigan* v. *Long*, 463 U.S. 1032, 1049-50 (1983) (applying *Terry* to uphold a protective search of the passenger compartment of a vehicle); *Maryland* v. *Buie*, 494 U.S. 325, 331-34 (1990) (relying on *Terry* and *Long* to uphold a "protective sweep" of a private home).

v. *Hicks*, this Court recognized the importance of such bright-line Fourth Amendment rules, observing there that the Court was "unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a 'plain-view' inspection nor yet a 'full-blown search.'" 480 U.S. at 328-29 (footnote omitted). By the same token, continued adherence to *Terry*'s bright-line rule will allow the police better to understand the scope of their authority and enable courts to monitor more easily the boundaries of that authority.

Second, although the scope of *Terry* pat-downs is limited, the doctrine recognizes the important and practical concerns of the police -- preserving the safety and security needs of the officer. *See* 392 U.S. at 23-24. There is thus no need for further tinkering with this longstanding doctrine.

Finally, while accommodating police safety concerns, *Terry* also ensures protection for the substantial privacy rights implicated in the search of one's person. The *Terry* Court wisely understood that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.* at 24-25. By carefully defining the circumstances in which such searches are permissible and limiting their scope, this Court properly confined such intrusions to serve only the limited objective of assuring police safety.

B. The non-weapon search of respondent's pocket violated *Terry*.

Officer Rose's search for drugs plainly exceeded the scope of *Terry*. During his pat-down of respondent, Officer Rose became certain of one fact: there was no weapon in respondent's pocket. Pet. App. A10. The Minnesota Supreme Court made the following finding: "There was never any possibility that the object in the defendant's pocket

was a weapon . . . ." *See id.* This was also the finding of the Minnesota intermediate appellate court: Officer "Rose never thought the lump [in the pocket] was a weapon." Pet. App. B4. When it became clear that the respondent was unarmed, "*Terry* ceased to legitimize the officer's conduct. Any further intrusion into the defendant's privacy required a warrant or probable cause to arrest, and the officer had neither." Pet. App. A12.

It is clear, moreover, that when Officer Rose *first* touched the pocket during his initial pat-down, he lacked probable cause to believe that drugs were present. *See id.* at A6 (finding that "the officer's 'immediate' discovery [of the contraband] in this case is fiction, not fact"). Indeed, Officer Rose was so uncertain of the pocket's contents that he conducted an independent search, manipulating and sliding the non-weapon object located in the pocket. *See id.* ("The officer testified that he was sure he had found crack cocaine only after (1) feeling a lump, (2) manipulating it with his fingers, and (3) sliding it within the defendant's pocket. That testimony belies any notion that he 'immediately' knew what he had found."). Neither safety concerns nor exigent circumstances necessitated such actions. Officer Rose was simply searching for contraband. In fact, the officer testified that one of his purposes for stopping Mr. Dickerson was to "check him for weapons and contraband." *See* 2/20/90 Tr. 9; *see also id.* ("I pat-searched the party for weapons and contraband.").

The Solicitor General's *amicus* brief, clearly recognizing that an *independent* search of respondent's pocket would violate *Terry*, attempts to rewrite the facts (and ignore the Minnesota Supreme Court's dispositive findings) to suggest there was no further search. However, the court here found that unlike the officer in *Terry*, who "confined his search strictly to what was minimally necessary to learn whether the men were armed," 392 U.S. at 30, Officer Rose conducted an exploratory search for drugs even though it was clear at the

time of this search that respondent was unarmed. Pet. App. A6-A7, A12.[2]

Basic common sense -- and not some "library analysis" -- teaches that a small lump (no bigger than a 200 milligram aspirin tablet) felt in a jacket pocket is *not* a weapon. That much Officer Rose knew when he first felt the lump. But he did not *yet* have any basis to believe the lump was contraband. That is why he conducted a further search. Indeed, on this record, it is impossible to imagine what else Officer Rose could have been doing when he moved and carefully examined the lump other than conducting an independent search for contraband beyond the scope of *Terry*. *See Arizona* v. *Hicks*, 480 U.S. at 324-25 (slight movement of turntable a distinct and separate search from initial search of apartment); *Leake* v. *Commonwealth*, 220 Va. 937, 942, 265 S.E.2d 701, 704 (1980) (Detective's action in "grasping and shaking" a paper bag held by defendant "constituted a prying into hidden places, an exploratory investigation, and an invasion and quest.").

Like the movement of the turntable in *Hicks*, Officer Rose's touching and manipulation of the object hidden in respondent's pocket -- an object clearly *not* a weapon -- "produce[d] a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the" initial pat-down. *Arizona* v. *Hicks*, 480 U.S. at 325. Because

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[2] These factual determinations, of course, should be accorded substantial deference. *See, e.g., Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1252 (1991) ("We normally give great deference to the factual findings of the state court."); *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 351 (1987) ("We . . . customarily accept the factual findings of state courts in the absence of exceptional circumstances."); *see also Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task"); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

Officer Rose was *not* entitled to "tak[e] action" by moving and manipulating the lump in respondent's pocket, and had no probable cause to believe the lump was contraband *before* taking that action, his search and seizure of it was unlawful under *Hicks*. 480 U.S. at 325; *see also* W. LaFave, 3 *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4(b), at 520 (2d ed. 1987) ("If during a lawful pat-down an officer feels an object which obviously is not a weapon, further 'patting' of it is not permissible.").

This Court applied these same *Terry* principles in *Sibron* v. *New York*, 392 U.S. 40 (1968), where a police officer, during an investigative stop, placed his hand in a suspect's pocket and seized several glassine envelopes of heroin. *See id.* at 45. Even though the officer did not consider the suspect armed and dangerous, he conducted a search solely for narcotics. *See id.* at 46 & n.4, 64. This Court invalidated the search, observing that:

> The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in *Terry* place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, [the officer] thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them. *The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception -- the protection of the officer by disarming a potentially dangerous man.* Such a search violates the guarantee of the Fourth Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents.

Id. at 65-66 (emphasis added). The facts here are indistinguishable, for while Officer Rose did not initially place his hand inside respondent's pocket, he nonetheless extensively searched the contents of the pocket after he was certain that respondent was unarmed, and did so solely in order to search for drugs.

If this Court were to hold that police officers may continue to pat down suspects even after they have determined -- as here -- that a suspect is unarmed, the effect on legitimate privacy interests would be profound. With such a finding, police would likely consider themselves equipped with a license to manipulate, touch, squeeze and feel a suspect's clothing and all the contents hidden therein during *every Terry* frisk. Such license, however, would ignore what the Minnesota Supreme Court cogently recognized:

> If given long enough, most police officers, or civilians for that matter, could pinch and squeeze and twist and pull and rub and otherwise manipulate a suspect's jacket and figure out what is inside. But the fourth amendment doesn't permit that type of intrusive conduct without a warrant or probable cause to arrest, and police in this case had neither.

Pet. App. A7.

Contrary to petitioner's suggestion, moreover, Officer Rose's manipulation of the hidden object was unquestionably *more* intrusive than the initial pat-down. In *Terry*, this Court noted that a brief protective frisk infringes upon significant privacy interests:

> [I]t is simply fantastic to urge that . . . a [frisk] . . . performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

392 U.S. at 16-17 (footnotes omitted).

Since even a limited pat-down constitutes a substantial privacy intrusion, it follows that a more extended, exploratory search, as occurred here, is an inherently more invasive event. Just as "the 'distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches' is much more than trivial for purposes of the Fourth Amendment," *Arizona* v. *Hicks*, 480 U.S. at 325 (citation omitted), so too is there a constitutionally significant difference between a limited protective search of a suspect's outer clothing and an extended manipulation and sliding of an object hidden in a pocket.

Finally, because "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation,'" *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978) (*quoting Terry* v. *Ohio*, 392 U.S. at 25-26), and since there existed no such exigent circumstances justifying Officer Rose's warrantless search for drugs, both the explicit holding, and the fundamental rationale of *Terry*, compels affirmance.

II. RECOGNITION OF A "PLAIN FEEL" EXCEPTION TO THE WARRANT REQUIREMENT WOULD CONSTITUTE AN UNJUSTIFIED AND UNWISE DEVIATION FROM THE COURT'S FOURTH AMENDMENT JURISPRUDENCE

A. The "plain view" doctrine fails to support the creation of a "plain feel" exception.

Officer Rose's actions cannot be justified under a "plain feel" exception to the Fourth Amendment -- an exception this Court has never recognized. Indeed, this position is so unpersuasive that the Solicitor General's *amicus* brief does not even propose such an exception when attempting to justify the seizure. Although petitioner contends that a "plain feel" exception would be a natural corollary of the "plain view" doctrine, this claim ignores the numerous doctrinal and practical dissimilarities between the two.

1. The incriminating nature of the contraband was not "immediately apparent" to the police.

In *Horton* v. *California*, 496 U.S. 128 (1990), this Court defined the scope of the "plain view" doctrine:

> It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First, *not only must the item be in plain view; its incriminating character must also be "immediately apparent."* . . .

> Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.

Id. at 136-37 (emphasis added) (footnote and citations omitted). The "immediately apparent" requirement is especially significant, since it ensures that "'the 'plain-view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.'" *Id.* at 136 (*quoting Coolidge* v. *New Hampshire*, 403 U.S. 443, 466 (1971) (plurality)).[3]

When the "immediately apparent" requirement is applied to the facts of this case, it is evident that the "plain view" doctrine provides little support for a "plain feel" exception. As shown above, when Officer Rose *initially* felt respondent's pocket during the pat-down, he was not immediately aware that contraband was present, Pet. App. A6 -- a fact which negates any "plain view" analogy here.

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[3] The importance of this requirement is shown by the many "plain view" cases in which evidence is suppressed because its incriminating nature was not "immediately apparent." *See, e.g., United States* v. *Donnes*, 947 F.2d 1430, 1438 (10th Cir. 1991) (because "[t]he 'incriminating character' of the contents of a closed, opaque, innocuously shaped container, such as a camera lens case, is not 'immediately apparent,'" court rejected application of "plain view" exception); *United States* v. *Beal*, 810 F.2d 574, 576-77 (6th Cir. 1987) (affirming suppression of "pen guns" where their incriminating nature was neither "immediate" nor "apparent"); *Moya* v. *United States*, 761 F.2d 322, 326 (7th Cir. 1984) (approving suppression of plastic bag containing drug paraphernalia seized after officers had observed only a corner of the bag; court found that "[t]here is nothing apparently incriminating about a plastic bag"); *United States* v. *Dart*, 747 F.2d 263, 269-70 (4th Cir. 1984); *United States* v. *Szymkowiak*, 727 F.2d 95, 98-99 (6th Cir. 1984).

In this respect, Officer Rose's uncertainty is no different from the uncertainty any officer would face when touching a small, unremarkable object hidden inside a suspect's clothing. The reason for this is simple: the sense of touch in this context is less immediately informative and reliable than sight. While a police officer can generally determine immediately whether an item in plain view is contraband, an officer conducting a pat-down in most cases cannot be so sure. This is particularly so where, as here, the item is an especially small object that is never seen and only felt through an outer garment. *See Commonwealth* v. *Marconi*, 597 A.2d 616, 623 n.17 (Pa. Super. Ct. 1991) ("[W]hen an individual feels an object through a pants pocket, . . . the sense of touch is not so definitive. The structure and shape of a small packet is not unique so as to preclude other options as to what that item might be."), *appeal denied*, 611 A.2d 711 (Pa. 1992); *State* v. *Broadnax*, 98 Wash. 2d 289, 298, 654 P.2d 96, 102 (1982) *(en banc)* ("The tactile sense does not usually result in the *immediate* knowledge of the nature of the item.") (emphasis in original).[4]

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[4] Petitioner cites three studies -- essentially all by the same authors -- to support the contention that "haptic identification" can be as reliable as sight. Pet. Br. 15 n.10. However, petitioner makes no claim that these studies assessed the reliability of haptic identification in situations where, as here, the touched object is felt through an outer garment.

More significant, petitioner ignores the conclusions reached by numerous experts that the sense of touch can be *less* accurate than vision in many contexts. *See, e.g.*, B. Jones, *The Developmental Significance of Cross-Modal Matching*, in Intersensory Perception and Sensory Integration 109, 123, 131 (R. Walk & H. Pick, Jr. eds. 1981) ("the few studies which have compared visual and tactual judgments of surface texture show that visual judgments are typically more efficient, being either more accurate . . . , less variable . . . , or more rapid . . . ."; as compared to tactual processing, "[v]isual processing is clearly the more accurate and immediate"); B. Jones & S. O'Neil, *Combining Vision and Touch in Texture Perception*, 37 Perception and Psychophysics 66, 66 (1985) ("The

(continued...)

2. A "plain feel" exception will produce serious privacy intrusions entirely absent from the "plain view" setting.

Further distinguishing the "plain feel" situation from the "plain view" setting is that the level of governmental intrusiveness in the former is far greater than the latter. This Court has emphasized that "[i]f an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy." *Horton* v. *California*, 496 U.S. at 133 (citations omitted); *see also Soldal* v. *Cook County*, 61 U.S.L.W. 4019, 4022 (Dec. 8, 1992); *Payton* v. *New York*, 445 U.S. 573, 587 (1980). According to this Court's reasoning, an individual cannot legitimately claim a reasonable expectation of privacy in an object exposed to plain view.

A "plain feel" exception, on the other hand, would necessarily implicate significant privacy interests. Unlike the individual who leaves personal items exposed to plain view, respondent here manifested a legitimate and reasonable intention to keep the object in his pocket private. Consequently, when Officer Rose touched, slid and manipulated the object,

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[4](...continued)
evidence is clear that visual judgments of form are made more efficiently than the corresponding haptic judgments."); I. Rock & C. Harris, *Vision and Touch*, 216 Scientific American 96, 96 (1967) ("[T]he sense of touch seems far too imprecise to be the source of the accurate perception of form and space that is achieved through vision."); D. Warren & M. Rossano, *Intermodality Relations: Vision and Touch*, in The Psychology of Touch 119, 123, 124 (M. Heller & W. Schiff eds. 1991). Indeed, even in one of petitioner's own studies, the observation was made that "[t]he dimension of shape is particularly problematic for haptics, both in an absolute sense and relative to vision." R. Klatzky, S. Lederman & C. Reed, *There's More to Touch than Meets the Eye: The Salience of Object Attributes for Haptics With and Without Vision*, 116 J. Experimental Psychol.: General 356, 358 (1987).

respondent's expectations of privacy were violated. Such violations would be inevitable under a doctrine that would tolerate the warrantless touching and feeling of objects hidden in a person's clothing beyond the limited scope of a *Terry* pat-down for weapons. *See* Comment, *The Case against a Plain Feel Exception to the Warrant Requirement*, 54 U. Chi. L. Rev. 683, 703 (1987).

Because touch in this context is less informative than sight, the police will likely need to (or want to) conduct more intrusive, thorough and protracted "plain feel" *Terry* frisks, while they struggle to determine the nature of a felt object. Indeed, a "plain feel" exception might well encourage officers to commence a *Terry* frisk where they otherwise would not have, merely so they can discover if the suspect possesses contraband. Still worse, such an exception may prompt the police to conduct full-scale searches of all detainees. As such, the privacy protections carefully built into *Terry* -- and in no way threatened by the "plain view" doctrine -- would be seriously eroded.

It also seems certain that under a "plain feel" regime, many entirely innocent, everyday items carried by people will inevitably be subject to intrusive manipulation, squeezing, pinching, touching and seizing by officers who mistake these objects for contraband. For example, to an officer's touch, bottles of aspirin might feel like bottles of illegal drugs; lipstick, thimbles, change holders and pill containers might feel like crack vials; food, medicine and vitamins wrapped in tinfoil, plastic, cellophane or paper may feel like drugs packaged in such types of wrappers; currency, notes, letters, photographs and papers might feel like wrappers or envelopes containing drugs; pens, pencils, pipes, lighters and makeup products may feel like crack pipes or syringes; and beepers, calculators, wallets, jewelry, camera lens cases, hygiene products, cassette tapes, cigarette boxes, makeup kits and change purses might feel like the countless different containers/objects that can be used to store narcotics. No

amount of "police experience" will eliminate these inherent uncertainties from the realm of a "plain feel" exception.[5]

Under petitioner's "plain feel" exception, however, an officer would feel entitled to slide, squeeze and manipulate all of these objects in the course of a warrantless *Terry* search conducted only on the basis of reasonable suspicion. *See Commonwealth* v. *Marconi*, 597 A.2d at 623 ("[T]he minute amount of drugs that was found on Marconi's person could not have been identified through the sense of touch. The object is as consistent in feeling with a button or an aspirin as it is with methamphetamine. To sanction a search under the facts of this case would be to allow police officers to assume that all small objects in one's pocket could be drugs. This, we can not do.") (footnotes omitted). Such intrusive police actions -- entirely alien to the "plain view" setting -- vividly illustrate the differences between "plain view" and "plain feel."[6]

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[5] Besides privacy infringements, the police will also be interfering with possessory interests when they temporarily seize such innocent items of personal property. And of course, these "seizures of property are subject to Fourth Amendment scrutiny" just as any search may be. *Soldal* v. *Cook County*, 61 U.S.L.W. at 4022; *see also Horton* v. *California*, 496 U.S. at 133-34 ("A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. . . . A seizure of [an] article . . . would obviously invade the owner's possessory interest.") (footnote and citations omitted).

[6] Even if this Court were to adopt a "plain feel" exception, there remains the issue of delineating the appropriate level of suspicion necessary to justify invoking the exception. Given the significant intrusions that would be occasioned by a "plain feel" exception, as well as the inherent unreliability of the sense of touch, a standard higher than probable cause -- one of "reasonable certainty" -- is far preferable. *See, e.g.*, *United States* v. *Williams*, 822 F.2d 1174, 1184-85 (D.C. Cir. 1987) (to invoke the "plain touch" exception, more than probable cause is needed; the officer must have a "reasonable certainty that the container holds contraband or evidence of a crime"); *State* v. *Vasquez*, 112 N.M. 363, 368, 815 P.2d 659, 664 (N.M. Ct. App.) ("the 'plain touch' (continued...)

B. A "plain feel" exception would jeopardize the effective and manageable bright-line *Terry* rule.

By affirming the Minnesota Supreme Court's decision, this Court would preserve the clearly defined *Terry* rule now in place: a limited protective search is justified *only* where the suspect is considered armed and dangerous. Currently, police officers know that they may not search for contraband during a *Terry* stop.

This line is an easy one for the courts to administer -- certainly far easier to monitor and enforce than would be the case in a "plain feel" regime. With a "plain feel" exception, the courts will be drawn into the daunting and time-consuming task of determining when the nature of a minute, unremarkable object was "immediately apparent" to the officer and when, as here, it was not. Thus, by preserving the bright-line approach of *Terry*, the Court would maintain the judiciary's ability to safeguard the careful balance the *Terry* Court drew between the privacy rights of the citizenry and the safety concerns of the police.

Nor should the Court upset this delicate *Terry* balance merely because of some attraction to "plain feel" based on claimed police efficiency. This Court has often emphasized that even where the efficiency of law enforcement is enhanced, that simply cannot justify unconstitutional police procedures. *See, e.g.*, *Mincey* v. *Arizona*, 437 U.S. at 393;

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[6](...continued)
exception applies only if a lawful touching convinces the officer to a reasonable certainty that the container holds contraband or other evidence of a crime"), *cert. denied*, 112 N.M. 363, 815 P.2d 1178 (1991).

see also Arizona v. *Hicks*, 480 U.S. at 329. And here any claim of efficiency is more imaginary than real.[7]

Indeed, a number of courts have rejected a "plain feel" exception, notwithstanding the possibility of improved efficiency. *See, e.g., State* v. *Collins*, 139 Ariz. 434, 435-36, 437, 679 P.2d 80, 81-82, 83 (Ariz. Ct. App. 1983) (Where the "state appears to claim a 'plain feel' exception to the Fourth Amendment," court invalidated a search and seizure in which officer "felt 'soft' objects which were obviously not weapons."); *State* v. *Rhodes*, 788 P.2d 1380, 1381 (Okl. Crim. App. 1990) (Court noted that "[t]he scope of a '*Terry* pat-down' is and must be strictly limited to a search for offensive weapons. When in the course of a frisk the officer feels an object, he is not justified in seizing it unless it reasonably resembles an offensive weapon.") (citations omitted); *Commonwealth* v. *Marconi*, 597 A.2d at 623 n.17, 624 (Court rejects a "plain touch" exception, noting that "[w]e can not lose sight of the fact that this began as a *Terry* frisk.

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[7] *See, e.g.*, R. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 Cal. L. Rev. 539, 588 & nn. 266-67 (1990) ("Studies of the Federal system show that only 0.4% of matters that U.S. Attorneys declined to prosecute were rejected primarily because of a search and seizure problem. Of prosecuted federal defendants, only 11% filed a motion to suppress on fourth amendment grounds; evidence was excluded on such grounds in only 1.3% of cases, and half of the cases in which evidence was excluded still ended in conviction.") *(citing* Comptroller Gen. of the U.S., *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* 8-9, 11, 13-14 (1979)); P. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 Am. B. Found. Res. J. 585, 606 (1983) ("Given the results of the empirical analysis it seems clear that the exclusionary rules . . . have a truly marginal effect on the criminal court system."); D. Dripps, *Living with Leon*, 95 Yale L. J. 906, 915 & n.63 (1986) ("overwhelming empirical evidence confirm[s] the [exclusionary] rule's negligible cost in terms of convictions lost by suppression rulings") (see sources cited therein).

Once the officer was satisfied that Marconi was not armed and dangerous, the inquiry should have ended.").[8]

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[8] Those courts that have adopted a "plain feel" exception have generally done so in factually distinguishable contexts. Indeed, the case law can essentially be divided into four separate categories, all of which are wholly distinct from the present case: (i) cases where the touched object was clearly a weapon, *see, e.g., United States* v. *Coleman*, 969 F.2d 126, 128 (5th Cir. 1992) (per curiam) (handgun felt in suspect's pouch); *United States* v. *Portillo*, 633 F.2d 1313, 1315 (9th Cir. 1980) (gun felt in paper bag found in car trunk), *cert. denied*, 450 U.S. 1043 (1981); *People* v. *Chavers*, 33 Cal.3d 462, 466, 189 Cal. Rptr. 169, 171, 658 P.2d 96, 98 (1983) (gun felt in shaving kit discovered in glove compartment) -- under *Terry*, of course, such weapons can be seized; (ii) cases where the touched object was located not on the suspect's person, but rather, in a separate container, *see, e.g., United States* v. *Williams*, 822 F.2d at 1176-77 (brown paper bag); *United States* v. *Ocampo*, 650 F.2d 421, 425 (2d Cir. 1981) (paper bag); *Henderson* v. *State*, 535 So.2d 659, 660-61 (Fla. Dist. Ct. App. 1988) (deodorant container found inside luggage); (iii) cases where the item was obviously and unmistakably contraband when it was first touched, so that no further search beyond the limited scope of *Terry* was required, *see, e.g., United States* v. *Ceballos*, 719 F. Supp. 119, 127 (E.D.N.Y. 1989) (agent felt a large package that "was a solid mass, about five inches by four inches by one inch"); *United States* v. *Pace*, 709 F. Supp. 948, 951 (C.D. Cal. 1989) (detective felt "two kilos of cocaine packaged in the form of 'bricks'"), *aff'd*, 893 F.2d 1103 (9th Cir. 1990); and (iv) cases where the officer reached into a suspect's clothing because he had felt a hard object of some size (and where it appears that the officer was uncertain as to whether it was a weapon), *see, e.g., United States* v. *Buchannon*, 878 F.2d 1065, 1066 (8th Cir. 1989).

In sharp contrast, this case involves the touching of a minuscule object that was hidden within the pocket of a knowingly unarmed suspect. As such, these cases could not possibly have addressed those "plain feel" implications presented here. The decisions embracing a "plain feel" exception simply failed carefully to consider the various "plain feel" issues highlighted by this case: that touch is less reliable than sight, especially where a particularly small object is touched; that the degree of intrusiveness in a "plain feel" setting is greater than in the "plain view" context; and that a "plain feel" exception would replace the bright-line

(continued...)

III. THE FACTS OF THIS CASE DO NOT JUSTIFY RELIANCE UPON THE SEARCH INCIDENT TO ARREST EXCEPTION

In contrast to petitioner, the Solicitor General does not attempt to defend Officer Rose's seizure on the basis of a "plain feel" exception, and proffers instead that the seizure was a justified result of a search incident to arrest. S.G. Br. 20-22. The facts of this case do not support the Solicitor General's position any more than they do petitioner's. The necessary predicate for a proper application of the search incident to arrest doctrine is that the police have lawfully obtained the constitutionally required level of information to establish probable cause to arrest. *See, e.g., Rawlings* v. *Kentucky*, 448 U.S. at 111. That predicate is missing here. As we have shown above, Officer Rose only developed such probable cause through an *unlawful* search that went well beyond the scope authorized by *Terry*. Since probable cause was acquired by unconstitutional means, the fruits of the subsequent seizure must be suppressed. *See, e.g., Vale* v. *Louisiana*, 399 U.S. 30, 35 (1970).

On the factual determinations here of the Minnesota Supreme Court, there is no need for this Court to consider whether the search incident to arrest doctrine would justify a seizure in a case -- *unlike* this one -- where the police develop probable cause to believe a suspect possesses contraband in the course of an appropriately limited *Terry* pat-down for weapons. Such a decision should await a case that properly presents that question.

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[8](...continued)
Terry standard with a rule that will encourage the police to conduct full-scale exploratory searches.

CONCLUSION

The judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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Dated: December 21, 1992